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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-459.

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY R. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL P. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF OF APPELLANTS JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE.

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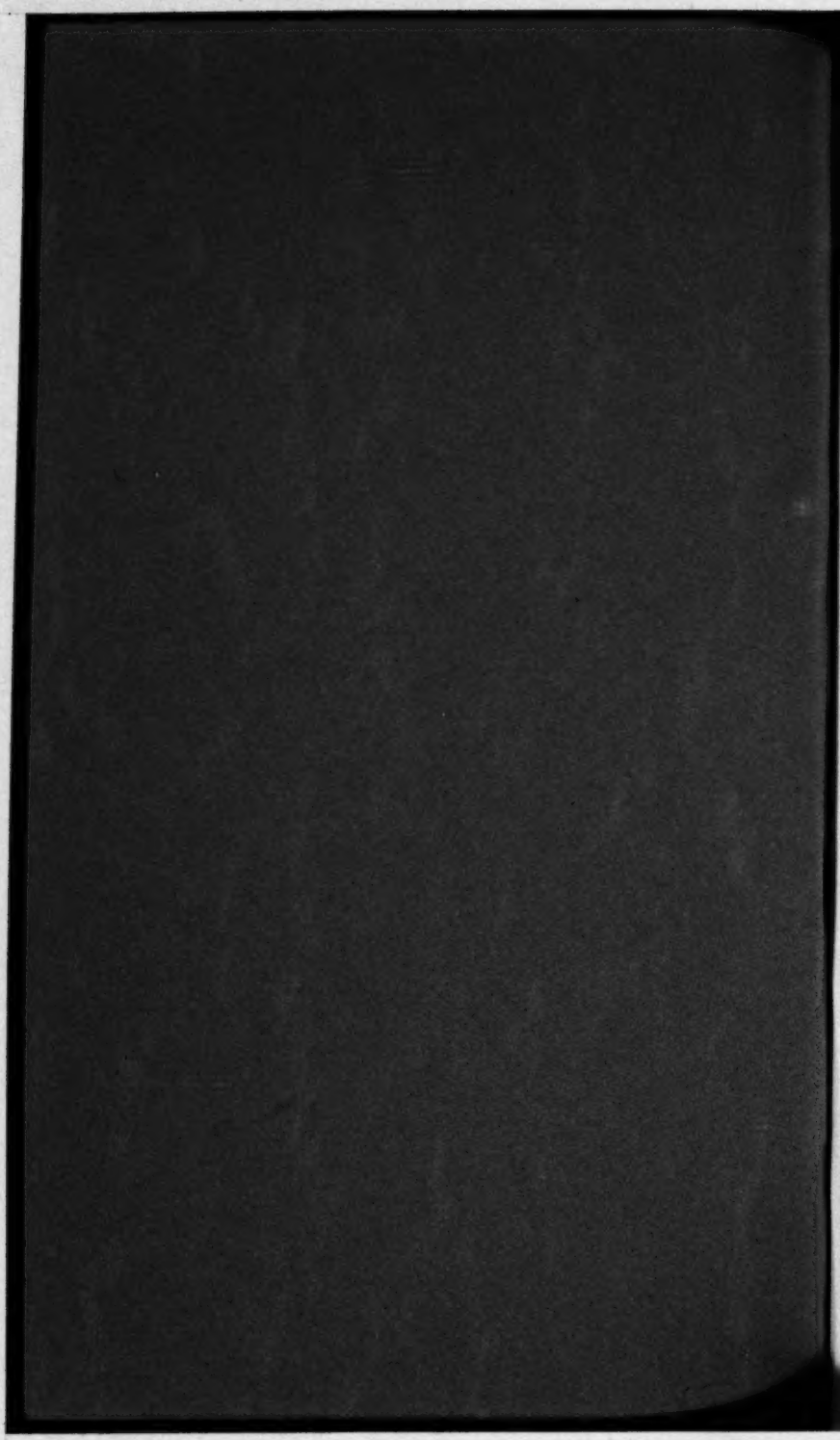

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-459.

GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA,

AND

JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE, AND HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, AND BENJAMIN S. LOWENSTEIN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF APPELLANTS JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR. AND ANNE P. WATSON, HIS WIFE.

OPINION BELOW.

The only Opinion of the three-judge District Court for the Eastern District of Pennsylvania in this case was entered on April 6, 1972, prior to joinder of issue by Answer in the case, and as the basis for denial of motions to dismiss made by Appellants (Defendants below). The District Court's Order of July 21, 1972, recites said Order (disposing of a later Motion for Summary Judgment) to be in accordance with that Opinion (A 87). The Opinion is reported in 346 F. Supp. 1356 (1972) (A 37-A 63).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, amendment XIV:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, amendment I:

"Congress shall make no law respecting an establishment of religion . . ."

Pennsylvania Parent Reimbursement Act for Nonpublic Education, August 27, 1971, P. L. —, No. 92, Pa. Stat. Ann. Tit. 24 § 5701, *et seq.*

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QUESTIONS PRESENTED.

The Act provides that the parent of a child who has completed the preceding school year in a nonpublic school in which the requirements of the compulsory school attendance law and of Title VI of the federal Civil Rights Act of 1964 are met, and for whom the parent paid tuition, shall be entitled to receive a reimbursement payment limited to $75.00 (if the attendance was in an elementary school) or $150.00 (if attendance was in a secondary school), or the actual amount of tuition paid, whichever is lesser. This payment to the parent is not earmarked for any school and may be used by the parent unrestrictedly, in any way that he desires, whether for education, family maintenance or otherwise. It becomes private funds, his own money.

1. Does this Act have a primary effect that advances religion?

2. Does the denial of the benefits of the Act to a parent who had paid tuition for a child enrolled in a nonpublic *non-religiously affiliated* school deny such parent the equal protection of the laws?

3. Does the denial of the benefits of the Act to a parent who had paid tuition for a child enrolled in a nonpublic *religiously affiliated* school deny such parent the equal protection of the laws?

STATEMENT OF THE CASE.

1. The Statute Involved.

Act 92 of 1971 provides that the state shall make payments to any parent who had paid tuition, for the already completed school year, for the education of a child in a nonpublic school. The Act covers parents of children in both nondenominational and denominational schools and makes no distinction between such parents. The specified payments are not payments of tuition and are in no way related to the tuition scales of different schools. The payments are not required by the statute to be paid over to any school or devoted to educational uses: the parent receives them unearmarked and without any attached condition as to their disposition. They become his money and are no longer public funds. The student must have been enrolled in a school wherein the requirements of the compulsory attendance law may be fulfilled and which meets the requirements of Title VI of the U. S. Civil Rights Act of 1964.

In accordance with the Act, the Pennsylvania Parent Assistance Authority reimburses the parent on the basis of the parent's verification that he had paid tuition for the past school year for a child enrolled in a nonpublic school as defined in the Act (Section 6). The Act specifically precludes the Authority from exercising any "direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools." (Section 4).

In Section 2 the Pennsylvania General Assembly stated its purpose in enacting Act 92:

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". . . in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children . . ."

The word "service", refers back to the concluding sentence of subparagraph (4) of Section 2:

"Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."

The premises upon which that conclusion rests are set forth in legislative findings contained in the four subsections of Section 2:

1. Parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.
2. The welfare of the Commonwealth requires that children be assured ample opportunity to develop their intellectual capacities.
3. Inflation and rising educational cost now imperil the ability of parents to continue to support nonpublic education.
4. Any substantial transfer of nonpublic school children to public schools in Pennsylvania will entail an intolerable public financial burden and seriously jeopardize present standards of public education.

Act 92 as a bill in the legislature, was known as House Bill 1379. The bill, with 67 sponsors, passed both the House and the Senate with comfortable majorities.[1] It was signed into law by the Governor on August 27, 1971.

1. H. 1379 passed the House by a vote of 132 to 63. It was then amended in the Senate (to change the percent of tax revenue in Section 5 from 25% to 23%) and passed as amended by a vote of 36 to 12. The bill was then returned to the House for concurrence where it passed by a vote of 173 to 16.

2. The Proceedings Below.

On September 13, 1971, the Appellees (the Plaintiffs below) brought this action, naming the State Treasurer as defendant. The Complaint alleged that the Act violates the Establishment, Free Exercise and Equal Protection Clauses of the Constitution and sought an injunction against the paying of any funds pursuant to the Act.

Thereafter, twelve parents, having children enrolled in nonpublic schools in Pennsylvania, moved under Rule 24(a) for intervention of right as parties defendant, stating that, by virtue of being prime beneficiaries of the Act, they had an interest in the subject of the action distinct from that of the named party defendant, the State Treasurer. Ten of these parents had paid tuition for their children enrolled in nonpublic schools which are church-related, while two of the parents, Seth W. Watson, Jr. and Anne P. Watson, his wife, had paid tuition for their child who attends a nonsectarian, nonpublic school. The District Court granted the parents' Rule 24(a) motion[2] (A 29-A 31).

All parties defendant then moved, under Rule 12(b)(6), to dismiss the Complaint for failure to state a claim upon which relief can be granted. The District Court, on April 6, 1972, issued an Order that the motion to dismiss be denied (A 56). Although at this point no Answer had been filed, nor any motion for judgment by plaintiffs, the Order was accompanied by an Opinion declaring the Act unconstitutional under the Establishment Clause. That is the only Opinion which has been rendered in the case. Its contents are discussed *infra*.

On April 28, 1972, the Court granted motions of the defendants to dismiss those counts of the Complaint relat-

2. The separate intervention of a parent, Henry E. Crouter, was likewise granted.

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ing to the Free Exercise and Equal Protection Clauses (A 64). On the same date the defendant Grace Sloan, State Treasurer, filed her Answer to the Complaint (A 65-A 67). On May 1, 1972, the parent intervener defendants Jose Diaz, *et al.*, filed their Answer to the Complaint, stating that to deny any intervener defendants the benefits of the Act solely because their children attend nonpublic church-related schools, or to deny any intervener defendants the benefits of the Act solely because their children attend nonpublic non-church related schools, would be to deny such intervener defendants the equal protection of the laws (A 68-A 73).

The intervener defendants Seth W. Watson, Jr. and Anne P. Watson, his wife, on May 3, 1972, moved for summary judgment. Their motion was supported by an affidavit which disclosed that they are eligible to receive payments under the Act and are parents of a child who is enrolled in a nonpublic non-church related school (A 77-A 79).

The court, on June 20, 1972, denied this motion without oral argument on the ground that "the plaintiffs seek no relief against the interveners Seth W. Watson, Jr., and Anne P. Watson, his wife." (A 84). In the same Order the court requested oral argument on the question of whether the Act "can properly be viewed as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related." (A 84-A 85). The plaintiffs also moved for summary judgment on May 3, 1972 (A 80-A 83).

On July 21, 1972, the District Court granted that motion, "it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith. . ." (A 87).

The intervener defendants Jose Diaz, *et al.*, on July 31, 1972, moved that the judgment be amended on the ground that there was no evidence in the record to support the Court's foregoing statement and, further, on the ground that the Act does not direct or earmark the payment of any funds, directly or indirectly, to any schools, nonpublic or public (A 90-A 91). On August 4, 1972, the Court denied that motion (A 92).

Thus, although its Opinion of April 6, 1972, was rendered prior to the Answer of the parent interveners which raised Equal Protection claims, the court below never issued a subsequent opinion addressing itself to those claims.

Furthermore, after ruling on the Motions to Dismiss, and denying the Motion for Summary Judgment by Seth W. and Anne P. Watson, and the court having asked for argument on the issue of whether the Act was severable in its application to them, the court, nevertheless, omitted to render any opinion respecting that issue.

The Opinion of the District Court states that the Supreme Court has developed three tests for determining whether a particular program offends the Establishment Clause: (1) whether the statute has a "secular legislative purpose", (2) whether "its principal or primary effect [is] one that neither advances nor inhibits religion", and (3) whether the statute fosters "an excessive government entanglement with religion." (A 42). The District Court found that Act 92 passed the first test (A 43). The Court did not apply or discuss the third test. The Court said that the Act violates the Establishment Clause for the following reasons:

1. ". . . the effect of the Act is to aid the schools and therefore the failure of the state to insure that the funds

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are restricted to secular education or general welfare services renders the Act unconstitutional." (A 51-A 52).

2. ". . . even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children." (A 34).

SUMMARY OF ARGUMENT.

Act 92 of 1971 was enacted to provide assistance to a broad class of Pennsylvania citizens who bear exceptional burdens in a growingly socialized society. These citizens are parents who have been supporting the private (including religious) education of their children.

Twelve such parents are appellants before this Court. They are caught between the pressures of a three-sided vise: legal compulsion, conscience compulsion, and economic compulsion.

The compulsory attendance laws require them—under criminal penalty—to send their children to schools.

Their consciences command them, in pursuit of intellectual good or moral goals, to choose schools other than schools provided by the state. For many parents this is a religious duty, as fully mandatory, as completely unavoidable, as the duty imposed by the state's attendance statutes.

Virtually all parents are obligated—under criminal penalty—to pay public school taxes and other taxes for public education. But parents are likewise the main source of support of nonpublic schools. The costs both of living and of schooling are constantly rising; taxation of individuals is a subject of nationwide protest. For most parents today, the burden of paying for public education, while at the same time paying for the education of their children in schools chosen according to dictates of conscience, is a heavy burden, rapidly becoming impossible for them to carry.

In recent years, the Pennsylvania legislature has tried to find a way out for the numerous citizens who have found themselves in such a position. In 1968 it took the "purchase of service" concept which it had for decades successfully utilized in relation to hospitals and child care institutions (both sectarian and nonsectarian) and applied this to non-

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public schools. This Court, in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) struck that program down, so far as religious schools were concerned, saying that it created excessive entanglements between church and state. For those who had the most vital and intimate interest in the outcome of that case—parents—the loss of the benefits of that act was serious. Still in pursuit of a constitutional means to aid this large sector of the public, the General Assembly thereafter enacted Act 92, the legislation here challenged.

The Act provides that the Commonwealth shall make stated payments (out of non-education funds) to any parent, who had paid tuition, for the already completed school year, for the education of a child in a nonpublic school. The payment is without conditions attached. Nothing in the Act requires or implies that the parent hand it over to any school, that he spend it on education, that he spend it on anything. The money becomes his. It is plainly a form of state assistance to persons whom the legislature, in its sound judgment, recognized as bearing special burdens and having, as a class, special need. The Act involves *no* relationships—"entangling" or otherwise—between the state and schools.

The District Court, however, has held that Act 92 is a law respecting an establishment of religion, on the ground that (according to the court) it has a "primary effect which advances religion". The court reached that conclusion by saying (1) that the Act is really a "subsidy" to religious schools and (2) that "a possible and quite likely use of the aid . . . is to enable parents to continue to pay tuition at sectarian schools." Thus the court has put the "primary effect" label on a vague and novel test of its own devising.

Act 92 has no primary effect which advances religion. It awards no subsidy to any school. It pays no tuition to any school, directly or indirectly.

Furthermore, the District Court's ruling plainly denies the appellant parents the equal protection of the laws. It is intended to be applied to parents whose children attend nonsectarian schools as well as to parents whose children attend sectarian schools. To read the nonsectarian school parents out of the Act without basis, as did the court below, is to classify them arbitrarily and to their substantial detriment—a classification whose invidious character is only made more obvious by the fact that the court considered them minority beneficiaries.

The court below also denies equal protection to the appellant parents whose children attend religiously affiliated schools. Act 92 provides a public welfare benefit in the form of payments to parents who fall within a rationally based class of persons. It undoubtedly also provides breathing room for them in the exercise of constitutional freedoms in educating their children. The court below says that a parent must be excluded from participation in this public welfare benefit solely on the grounds that (a) in the previous school year, he chose to have his child fulfill the Compulsory Attendance Law through enrollment in a religiously affiliated school and paid tuition therefor, and (b) it is "possible and quite likely" that he will expend his benefit payment under the Act for tuition in such a school. The court has thus wrongfully classified these latter parents also. According to its rule, if it be shown that a parent has exercised, or may yet exercise, a choice of a state-approved religiously affiliated school for his child—which choice is nothing other than an exercise of religious conscience—that parent must be disqualified from participating in the public welfare benefit which he otherwise (upon surrender of his conscientious choice) would enjoy. Such a classification, on account of religious views, is fully as abhorrent as classifications on account of race, lineage or alienage.

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ARGUMENT.

I. ACT 92 IS NOT A LAW RESPECTING AN ESTABLISHMENT OF RELIGION.

A. The Act Has a Secular Legislative Purpose.

The court below correctly stated the three tests under the Establishment Clause, which this legislation would have to meet, relating, respectively, to "secular legislative purpose", "primary effect that neither advances nor inhibits religion", and excessive "government entanglement with religion." It concluded that "the Act expresses a legitimate secular objective consistent with the Establishment Clause." (A 43). And see *United States v. O'Brien,* 391 U. S. 367, 383-385 (1968) and Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 529 (1947).

B. The Act Has No Primary Effect Which Advances Religion.

The Court found Act 92 to fail the "primary effect" test. This the court did, first, by saying that the Act provides, in effect, a subsidy to sectarian schools unrestricted to secular objectives, and secondly, that it "encourages" parents to send their children to church-related schools because a "possible and quite likely" use of the payments by the parents will be "to continue to pay tuition at sectarian schools."

Act 92 cannot be read to spell out a school subsidy. Its reference to schools, school children, education and educational cost do not render it an act subsidizing schools. Anyone familiar with family economics in Pennsylvania at the present hour, realizes that the cost, due to taxation and inflation, of educating children, is a major cost to most parents in the state. But to parents who respond to un-

deniable commands of conscience by educating their children in sectarian and other nonpublic schools, this cost is particularly burdensome.

Act 92, although affording assistance to parents of extremely low income, does not limit its benefits to these. Its aim is to provide meaningful relief[3] in the face of the economic problem which the General Assembly carefully described in its findings:

> "(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. *However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.*" (Emphasis supplied.)

The extreme impact of inflation is particularly visible in the Consumer Price Index. For the Philadelphia Area the annual average (on all items) has moved from 90.1 for 1962 to 127.0 for 1972. While between 1962 and 1967 this was an increase of 9.9 points, for the next five years the increase has been 27 points. This runs very close to the U. S. city average. U. S. Department of Labor, Bureau of Labor Statistics, *Consumer Price Index For Urban Wage Earners and Clerical Workers* (1973). As the individual's cost of living has mounted, so has his tax burden. Most Pennsylvanians now pay a federal income tax, a state income tax, local per capita taxes, a sales tax, and various special taxes. The public school tax in Pennsylvania has *more than doubled* in the past decade, as has the average per pupil

3. Act 92 may also be seen in the light of the evident need, in a growingly socialized society, for the making by government of allowances to individuals to enable them to enjoy options in pursuit of personal goals of human freedom and human dignity.

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cost. Pennsylvania Department of Education, *Statistical Report of the Secretary of Education for the School Year Ending June 30, 1971,* Tables 59, 65 (1972). If education which is 100% publicly funded has thus increased in cost, it is not surprising that a burden of a similarly escalated cost has had to be borne by supporters of private education.

The legislature, in devising this piece of social legislation, could well take into account the foregoing factors, and expressly note them, in writing a provision for family or parental economic relief, without at the same time creating, directly or indirectly, any school subsidy. The aim, in statutory construction, "is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 30 (1937). The legislative finding and declaration of policy must and can be read so as to preserve the Act.

The court below defined what it said was "the issue" in this case—not any question of "unrestricted grants" to schools, but something quite different:

> "The issue before this court is whether *individuals* may receive state funds *solely because they have paid tuition at a church-related school.*" (A 50, Footnote 7. Emphasis supplied.)

The court developed its discussion of this with the following reasoning (A 51, *et seq.*):

1. Parents (out of their own pockets and not with public funds) pay tuition to church-related schools.
2. Tuitions are the "very life blood" of private educational institutions.
3. Under Act 92, the state makes payments to parents who have paid tuitions at church-related schools.
4. Therefore, the state provides such schools their "very life blood".

5. Therefore, Act 92 has a primary effect which advances religion and is unconstitutional under the Establishment Clause.

As can be seen, certain linkages must be assumed before those five statements can be coupled together. A fatal *non sequitur* is found as between No. 3 and No. 4. To get from No. 3 to No. 4, the court would have to have established that Act 92 requires a parent to hand the payment over to a church-related school, or that the parent would not have exercised his free choice of a nonpublic school but for the tuition reimbursement. But no provision of the Act, directly or by implication, imposes such a requirement, or even a requirement that the parent devote the payment to any educational use. The payments to the parent are unearmarked, and they are *ex post facto* the choice of a qualified school for secular education under the compulsory attendance laws. Since the payment to the parent comes under his unrestricted power of disposition and control, it has become *his* money, and is no longer public money.

There is no subsidy, direct or indirect. No tuitions are paid under this Act. No "voucher" system is set up. No parent is a "conduit", irrevocably committed to later making payment to a school. Thus the Court's entire discussion of *Almond v. Day*, 197 Va. 419 (1955), *Hartness v. Patterson*, 179 S. E. 2d 907 (S. Carolina 1971), etc. and the whole topic of tuition payments is not relevant (A 53-A 54). Further, no school may assert a claim for any money under the Act. What a particular private school may hope for, it may or may not receive. That will be up to the parent—who may change to a different private school, change to a public school, move from the area, pay no tuition because his child has graduated or for any other reason that suits him. All-knowing imaginings and cocksure presuppositions concerning the "parochial" schools and the

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citizenry who have historically supported them cannot supply what the legislature left out of Act 92: one comma of legal right in any school to one cent of funds under the Act. If the parent is a "conduit", let it be asked: what provision of what law would give what school standing to enforce (and against whom) a claim for the "tuition"? But to raise the question is to reveal the total baselessness of the District Court's facile charge of "subsidy".

The lower court well recognized the difficulty of attempting to establish Act 92 as providing a subsidy to sectarian schools, or a tuition earmarked for them. It could not, of course, say that parents *will, in fact,* send their children to sectarian schools due to the payments. So it dealt with the point by saying that they *might.* To resolve the question of whether the Act has any necessary primary effect of advancing religion, the court turned to deemed probabilities, here saying that in *Tilton v. Richardson,* 403 U. S. 672 (1971), the Supreme Court had

> ". . . found the *possibility* of such [religious] use enough to strike down the provision of the statute which permitted the unrestricted use of the building after twenty years. It is clear that a *possible and quite likely use* of the aid under review is to enable parents to continue to pay tuition at sectarian schools." (A 53. Emphasis supplied.)

Thus the lower court has interposed a new test (never in fact pronounced by the Supreme Court) for laws respecting an establishment of religion. The Supreme Court has never held any law invalid on the principle that in incidentally conforms to a citizen's religion preference. *McGowan v. Maryland,* 366 U. S. 420, 442 (1961); *Walz v. Tax Commission,* 397 U. S. 664, 673 (1970). If that were so, laws providing for tax exemption of churches would be

invalid. If that were so, the compulsory attendance laws of all fifty states would be invalid; for it is by virtue of such accommodating laws that six million children in the United States may legally attend parochial schools. If that were so, the following statements of this Court in *Walz v. Tax Commission,* 397 U. S. 664, 671 (1970) must now be deemed repudiated:

> "Surely, bus transportation and police protection to pupils who receive religious instruction *'aid'* that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age." *Walz, supra,* at 671. (Emphasis supplied.)
>
> "*'When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to our spiritual needs.'*" *Id.* at 672. (Emphasis by the Court.)

This Court said, in *Lemon v. Kurtzman,* 403 U. S. 602, 612 (1971) that "the three evils against which the Establishment Clause was intended to afford protection . . ." are "sponsorship, financial support, and active involvement of the sovereign in religious activity." Neither sponsorship, financial support, or active involvent of the state in religious activity are provided by Act 92.

Nor can any rule of "possible and quite likely" serve as a constitutional standard for deciding that an admittedly secularly motivated enactment of a state is a law respecting an establishment of religion. The parent can indeed pay over to a church money which he received under any other social welfare program as well as under the Act. In that respect he differs in no wise from a recipient of public assistance in Pennsylvania, who likewise may pay over to a church the earmarked assistance which he receives.

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The District Court's use of this Court's decision in *Tilton v. Richardson* calls for correction. The facts of *Tilton* were that buildings were constructed on sectarian college campuses at public expense and under state restrictions limiting their use to secular functions. The Supreme Court struck down that part of the legislation in question which limited the government's power of recapture of the capital grant to a twenty year period for violation of those restrictions. Unlike the provision considered in *Tilton*, the funds under Act 92 are not consigned to sectarian schools.

The District Court likewise invents erroneous "primary effect" doctrine in its following innovation:

> "Finally, in order for a court to conclude that a statute has the constitutionally impermissible effect of advancing religion, *the court is not required to conclude that the scheme of assistance will necessarily aid religion; the court can conclude that the statute has the effect of advancing religion if the terms of the statute fail to preclude a possible use of government funds to promote religious exercises.*" (A 49. Emphasis supplied.)

The court thus says that a statute may advance religion without aiding religion. It implies, further, that practically all legislation in the United States may be declared unconstitutional, whether related to schools, railroads, parents, or the national forests, since, on the court's premises, *all* enactments can be declared to advance religion. We cite this passage from the court's opinion, not to cavil, but because its extravagance further illustrates the lack of due process accorded to the parents and this legislation throughout the proceedings below (See pp. 6-8, *supra*).

Finally, the Order of the court below of July 21, 1972 (A 87) recites that it grants plaintiffs' motion for summary judgment upon consideration of the record, briefs and argu-

ments, and "it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith." There is no record foundation for the figure 90%, nor has any witness, document, or admission been placed in the record to give substance and meaning to the words "controlled", "religious organizations", "propagating and promoting", or "religious faith".

Act 92 does not create any religious preference. It deals with parents, not with schools or denominations.

The test of nonpreference of religion is to be found in the fairness and neutrality of classification in a statute's coverage. See *Walz v. Tax Commission, supra,* at 669. Thus in *Walz,* the fact that the economic relief from tax exemption redounded to greater savings to those religions which owned churches of far greater value than the majority of sects did not, in law, amount to an unconstitutional preference for any religion. Similarly in *Board of Education v. Allen,* 392 U. S. 236 (1968), the Court could well assume that Catholic school students would, by reason of their predominant numbers, receive the major portion of the statutory benefit. In *Sherbert v. Verner,* 374 U. S. 398, 409 (1963), this Court flatly rejected the contention that the exemption of Seventh Day Adventists from unemployment compensation laws would be a preference for their religion by the state, so as to constitute an establishment of religion. Absent any invidious facial discrimination among denominational and nondenominational school students, the claim of preference of religion is clearly without foundation in the law.[4]

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4. It is of interest to note that our national policy has been generous in appropriating huge amounts of funds—taken from all taxpayers—to achieve public needs abroad, even where such appropriations have constituted direct financial support to governments

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The reasoning of the court below, upon which it concludes that Act 92 has a primary effect that advances religion, plainly has no foundation in our traditions and in decisions of the Supreme Court.

C. The Act Does Not Give Rise to Excessive Government Entanglement With Religion.

The court below did not hold that Act 92 calls for, or would lead to, any entangling relationships between religion and the state. Act 92 creates no administrative or supervisory relationships whatever between the state and nonpublic schools. Rather, the Act explicitly prohibits such relationships. It provides, in Section 4, that the Parent Assistance Authority

> ". . . shall exercise no direction, supervision, or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools."[5]

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4. (Cont'd.)

(*e.g.*, the Moslem nations, Israel, Great Britain, Spain) whose constitutions, statutes or known official public policy formally recognize, prefer, or support a single religion. See comment of Mr. Justice Douglas in *Kurtzman, supra*, 631. Such aid has also included direct money subsidy to religious elementary and secondary schools. Among many examples of such granting have been appropriations under the Foreign Assistance Act, under which various educational institutions, including rabbinical schools, in Israel have been subsidized. See Public Law 90-249, Jan. 2, 1968, 81 Stat. 936; Report No. 91-603, Senate Committee on Foreign Relations, Dec. 10, 1969, 23. Moslem and other sectarian institutions have been similarly financed. Foreign aid statutes, treaties and executive orders—no less than domestic legislation—are controlled by constitutional limitations. *Reid v. Covert*, 354 U. S. 1, 16 (1957). See also Henkin, *The Constitution, Treaties and International Human Rights*, 116 U. Pa. L. Rev. 1012, 1015-1020 (1968).

5. The sole possible contact between the state and the schools, under the Act, is one in which the Pennsylvania Assistance Authority, under the powers granted it in Section 8, may seek to determine the

The Supreme Court, in *Lemon*, cited approvingly its own prior decision in *Board of Education v. Allen*, 392 U. S. 236 (1968). As the record in *Allen* shows, the New York program there upheld by the Court involved fairly extensive administrative relationships and state controls. The Court was careful to point that out. *Id.* at 239, 245-246. Furthermore, the New York program called for substantial state expenditures in support of secular educational programs conducted by sectarian schools. Yet the Court did not view the New York program as one which involved any "excessive entanglement" between government and sectarian schools.

Unlike the New York program, Act 92 does not provide for any administrative relationships between the state and schools, nor the transfer from the state to the schools of money or property. Thus "the factor that distinguishes" both *Allen* and *Everson v. Board of Education*, 330 U. S. 1 (1947) from the program struck down in *Lemon* is vitally present in Act 92 as its essential characteristic: the state aid is "provided *to the student and his parents—not to the church-related school.*"

Finally, the appellant parents refer to two related recent decisions. Appellees' Motion to Dismiss or Affirm moved the Supreme Court to dismiss the appeal or to affirm the judgment of the court below on the sole ground that the questions herein presented have been rendered insubstantial by the decision of *Wolman v. Essex*, 342 F. Supp. 339 (E. D. Ohio), *aff'd.* — U. S. —, 34 L. Ed. 2d 69 (1972). The Memorandum For The United States As *Amicus Curiae*, 10, 11, well points out factors which distinguish both the stat-

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5. (Cont'd.)
accuracy of a statement submitted by a *parent* in connection with reimbursement. That contact involves no administration, inspection, surveillance, auditing or control by the state of any school. If the parent has made a false statement, no school can in any way be affected by any action of the state under the Act.

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utes and the cases coming, respectively, from Ohio and Pennsylvania. The appellant parents note, in particular, the following conclusion presented in the Memorandum:

> "The Ohio statute invalidated in *Essex* is different from the Pennsylvania statute in at least one significant respect. The Ohio statute required substantial involvement by both the State Board of Education and the State Legislature in fixing the total amount the state would provide for tuition reimbursement. J. S. No. 71-1664, pp. 18-20, 50-51. The statute thus directly posed the danger of the 'successive and very likely permanent annual appropriations that benefit relatively few religious groups' which concerned the Court in *Lemon v. Kurtzman*, 403 U. S. at 623.
>
> "The Pennsylvania statute, on the other hand, avoids that problem, since it provides that 23 percent of the total receipts from the state cigarette tax will be paid into the parent reimbursement fund from which the tutition reimbursement payments are to be made. If the amount thus generated for the fund is insufficient to pay the $75 and $150 reimbursements, their amount is to be reduced *pro tanto* (J. S. 24a-25a). There will accordingly be no occasion for further legislative involvement or political debate once the program is placed in operation. Cf. *Tilton v. Richardson*, 403 U. S. at 688." *Id.* at 11.

On October 20, 1972, the decision in *Committee for Public Education v. Cherry*, 350 F. Supp. 655 (S. D., N. Y., 1972) invalidated several sections of an act which amended the New York Education Law so as to provide for, *inter alia*, direct grants of money to nonpublic schools for maintenance and repair of buildings, as well as reimbursement of tuition to parents with family incomes of less than $5,000

per annum. This program is administered by the Commissioner of Education. The court held that, since the parent described in the Act is in an extremely low income bracket, it was "the very assumption of the Legislature that he will use the money grant for tuition." The court therefore concluded that the parent was "simply a conduit" for public funds. The court at the same time correctly stated:

> "While . . . there is a distinction between a grant to the family and a grant to the parochial school, there is no such distinction where the parent is a mere conduit for a payment of tuition. In the former, the costs assumed by the State were generally borne by the parents, in the first instance, and it is they who are being reimbursed, not the school. In the case of tuition, it is the school which benefits by getting tuitions from State funds which it might otherwise not receive." *Id.* at 668.

This distinction is precisely observed in Act 92, under which, as has been seen, the parent cannot be legally identified as a "conduit". Not acknowledging the correctness of the judgment of the court in *Cherry*, it is nevertheless important to point out that Act 92 is distinguishable from the New York statute in important respects. While the New York statute amends the New York Education Law, is administered by the Commission of Education, is financed out of public school funds, and is interlocked with statutory provisions for grants to schools for their maintenance, the Pennsylvania statute is an independent enactment, not a part of the Pennsylvania School Code or other educational statute. It is administered by an independent authority. It uses no moneys derived from the school tax. In the instant case, as contrasted with *Cherry*, no party has asserted Free Exercise claims, and the parent appellants Diaz, *et al.*, have not asserted (and do not believe) that the constitutionality of

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the legislation depends upon the economic benefit it may confer upon the state by preventing the demise of nonpublic schools.

For all of the foregoing reasons, it is submitted that Act 92 is not a law respecting an establishment of religion.

II. DENIAL OF THE BENEFITS OF THE ACT TO A PARENT WHO HAD PAID TUITION FOR A CHILD ENROLLED IN A *NON-RELIGIOUSLY* AFFILIATED SCHOOL DENIES TO SUCH PARENT THE EQUAL PROTECTION OF THE LAWS.

Two of the parent appellants, Seth W. Watson, Jr., and Anne P. Watson, his wife, paid tuition for their child, Ellen P. Watson, to a nonpublic nonsectarian school and are otherwise eligible as statutory beneficiaries of the Act (A 78). Following intervention granted by the court, they moved for summary judgment (A 77). The court below denied their motion on the stated ground that the plaintiffs had sought no relief against them.[6] The court thereafter, by its Order of July 21, 1972, granted the plaintiffs' motion for summary judgment and enjoined the payment of funds under the Act to parents of children attending *any* nonpublic schools (A 87). These rulings clearly deny to Seth W. Watson, Jr., and Anne P. Watson, the equal protection of the laws.

A. The Court's Denial of Fair Procedural Due Process.

Having recognized the Watsons as parties, the District Court denied them procedural due process. Obviously, the court below is completely in error in its reasoning that the motion of these parents must be denied, "it appearing

6. "*It appearing that the plaintiffs seek no relief against the intervenors* SETH W. WATSON, JR. and ANNE P. WATSON, his wife, the motion for summary judgment of said intervenors is DENIED without oral argument." (A 84).

that the plaintiffs seek no relief against [them]." Mr. and Mrs. Watson were granted intervention by the court on January 19, 1972, "as parties defendant pursuant to Rule 24(a) . . . the Stipulation of counsel indicating no objection to the granting of the motion, and it appearing to the Court that the Intervenors claim an interest relating to the property which is the subject of this action and are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect that interest." (A 29-A 30). The fact that the plaintiffs had not initially chosen to make Mr. and Mrs. Watson defendants can have no remote bearing upon whether or not, once the court had made them defendants, their motion for summary judgment should have been denied.

B. Failure of the Court to Follow State Law on a State Question.

1. The Watsons Are Intended Statutory Beneficiaries.

The District Court has refused to apply state law in what is admittedly a state question. It is clearly in error in its subsequent denial (as provided for in its Order of July 21, 1972) of the benefits of the Act to the Watsons. The Act (Section 3(1)) defines "parent" as follows:

> "(1) 'Parent' means a resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis to such child."

The Act (Section 3(2)) defines "nonpublic school":

> "(2) 'Nonpublic school' means any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Common-

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> wealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352)."

Mr. and Mrs. Watson are "parents" within that definition. Further, they are eligible for the benefits of the Act within the statutory terms (A 78-A 79). The fact that their child attends a *nonsectarian* school certainly cannot disqualify them under the Act, since the Act does not limit its benefits to parents whose children attend sectarian schools. Rather, it employs the term "*nonpublic* school". The Watson parents had paid a tuition for a child of theirs who attended just such a school. The court below appears to reason that Act 92 was intended mainly for parents whose children attend sectarian schools, and that, therefore, the Watson parents were not intended beneficiaries. Such reasoning does the most obvious violence to the inescapably clear language of the Act. If the General Assembly had desired to say "sectarian", it could and would have done so. In its all too evident haste to condemn Act 92 (see pp. 6-8, *supra*), the court below missed the Pennsylvania reality, that there are real life citizens of that state whose children are enrolled in non-religious private schools. Substantial numbers of such parents have applied for benefits under the Act. To deny them these benefits, on the ground that their children attend nonsectarian schools, or on the ground that children of other parents in the class attend sectarian schools, is a palpable violation of the equal protection principle. This gratuitous denial is vividly pointed up by the fact that the plaintiffs, in their complaint, did not seek to block benefits to parents of nonsectarian school pupils (A 10) and so stated in their oral argument.

2. The Court's Failure to Give Effect to the Severability Clause.

Finally, even under the court's erroneous view that the Act calls for an illegal subsidy to sectarian schools, the Watson parents, whose child attends a nonsectarian school, can in no way be affected. Payment to them of the benefits of the Act, under such erroneous view, could raise an Establishment Clause issue only if the Act were not severable in its application. The Watsons do not question the principle that, where the statutory text constitutes an interwoven, inseparable whole, invalidity of some provisions may so taint the rest as to require a declaration that the whole statute is invalid. Pennsylvania Statutory Construction Act, Act of May 28, 1937, P. L. 1019, art. III, § 55, 46 Pa. Stat. Ann. § 555. That principle does not, however, control the question of applications of statutes. *Olin Mathieson Chemical Corporation v. Cohen*, 234 F. Supp. 80, 84 (E. D., Pa. 1964). Act 92 contains a severability clause which is not the typical severability clause, but instead is one in which the General Assembly dealt expressly with *different applications*. Section 10 thereof contains the following provision:

> "If a part of this act is invalid, in one or more of its *applications*, the part remains in effect in all valid *applications* that are severable from the invalid *applications*." (Emphasis supplied.)

C. The Court's Cumulative Errors Result in a Denial of Equal Protection to the Watson Parents.

The District Court's position is apparently that, because a majority of the beneficiaries of the Act assumedly will be parents of children attending sectarian schools, there can be no valid *applications* of the Act to the remaining beneficiary parents irrespective of the facts (a) that

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these other parents are expressly intended beneficiaries, (b) that the claims of these other beneficiaries cannot remotely be tainted with Establishment Clause objection and (c) that the legislature expressly intended and provided that these beneficiaries be granted payments irrespective of the status of any other parent beneficiaries. This position, again, does violence to the plain language of the statute and unconstitutionally deprives the Watsons of their rights.

The application of the statute, being a state rather than a federal question, the action of the court below seems all the more arbitrary and unfounded.

What is more, the court below says that the Watsons are persons belonging to a *minority* of statutory beneficiaries (A 87). This fact, if true, but accentuates the denial to them of the equal protection of the laws.

III. DENIAL OF THE BENEFITS OF THE ACT TO A PARENT WHO HAD PAID TUITION FOR A CHILD ENROLLED IN A *RELIGIOUSLY AFFILIATED* SCHOOL DENIES TO SUCH PARENT THE EQUAL PROTECTION OF THE LAWS.

A. The District Court's Avoidance of the Issue.

As has been seen, if the District Court had followed the law, it would have to have approved the granting of the benefits of the Act to the Watsons, who had paid tuition for their child at a non-religiously affiliated school. That court already had, however, on April 6, 1972, announced that Act 92 was unconstitutional (A 38). That was even before joinder of issue in the case, the Answer of the parent interveners being (timely) filed only on May 1, 1972 (A 68). That was before the District Court knew, or could have known, what any defendant might desire to raise in his Answer. The parents' Answers raised affirmative defenses of Equal Protection.

Conceivably, this placed the court in a dilemma—and not merely one pertaining to the precipitate character of its action of April 6th. A deeper problem may have been how, in light of its already having flatly stated that the Act was unconstitutional, to deal with the Equal Protection claims. But any weighing and discussing of those claims would have revealed not only that the Watsons were clearly entitled to the benefits of the Act, but that if the other parents were to be excluded from benefits, that could only be on the basis of their expression (through antecedent payment of tuition) of personal preference for a different kind of nonpublic state-approved school—a religiously affiliated school. The court avoided encounter with all of the problems which such a distinction would obviously raise by denying, without oral argument, the Watsons' motion for summary judgment (A 84) and then (in granting plaintiff's motion for summary judgment) lumping *all* the parents together and denying *all* of them the benefits of the Act (A 87).

This appeal opens up those issues which the District Court had thus sought to avoid.

B. The District Court's Classification Is Unreasonable.

The District Court has denied payments, under Act 92, to parents who had antecedently paid tuition, out of their own money, to religiously affiliated schools. This denial was on the basis of the court's belief that it is "possible and quite likely" that those parents will, in the future, due to the availability of benefits under the Act, make further payments, out of their own money, to such schools. In other words, what the court takes to be an indicated preference for such schools, among beneficiaries of general multi-purpose welfare legislation, is sufficient, in its eyes, to disqualify them from being its beneficiaries. As has

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been seen, the court also used this same factor to disqualify the Watsons; the court uttered not one word as to why the Watsons should be disqualified *except that their interests were appended to the "religious interests" of the "90%"* (A 87). In light of that fact, and since the court erred in excluding the Watsons as beneficiaries, the legal status of the twelve parents is seen as follows:

> 1. The Watsons express a preference for a nonpublic Pennsylvania school in which the state says the requirements of the Compulsory School Attendance Law are met, and which meets the requirements of Title VI of the Civil Rights Act, and which is nonreligiously affiliated. They may receive the benefits of the Act.
>
> 2. The Diaz, Zimmerspitz, Kretzmann, Harvey and Powell parents express a preference for a nonpublic Pennsylvania school in which the state says the requirements of the Compulsory School Attendance Law are met, and which meets the requirements of Title VI of the Civil Rights Act, and which is religiously affiliated. They are denied the benefits of the Act.

This is plainly a classification which denies the latter the equal protection of the laws.

State action[7] may not survive an equal protection attack where the classification is not "rationally related to the achievement of a legitimate state goal." *Dandridge v. Williams,* 397 U. S. 471, 475 (1970). The District Court did not point to any state goal and say that its achievement was the basis for its classification. In fact, with full opportunity to do so, it chose not to mention the matter of classification which the parents had so precisely raised.

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7. The action of the court below is "state action". *Shelley v. Kraemer,* 334 U. S. 1, 14 (1948).

If it be guessed that the District Court impliedly pointed to prevention of an Establishment of Religion as the "legitimate state goal" which it sought by its decision to achieve, consideration of the Establishment Clause cannot be the end of the inquiry where competing constitutional protections are presented.

The Supreme Court has long recognized that the Establishment Clause, though cast in absolute terms, may, if carried to a logical extreme, conflict with other constitutional protections. *Everson v. Board of Education,* 330 U. S. 1, 18 (1947); *Zorach v. Clauson,* 343 U. S. 300, 314 (1952); *Board of Education v. Allen,* 392 U. S. 236, 242-243 (1968); *Walz v. Tax Commission,* 397 U. S. 664, 665-669 (1970); *Lemon v. Kurtzman,* 403 U. S. 602, 614 (1971). Just as Establishment claims may encounter tension with, and find limitation in, Free Exercise claims, it similarly must be deemed limited by the prohibitions of the Equal Protection Clause.

Act 92 is designed as welfare legislation which takes into account the cost of education to parents and to the state, but here, as in *Allen,* there has been shown "nothing about the necessary effects of the statute that is contrary to its stated purpose." *Allen, supra,* at 243. The court below was unable to show that the "necessary effects" of the statute are contrary to its stated purpose which that court agreed was neutral and secular. It nonetheless has sought to classify the parents out of the statute by using as its standard of classification the vague and arbitrary norm that a "possible and quite likely use of the aid . . . is to enable parents to continue to pay tuition at sectarian schools." (A 53).

The appellant parents have not asserted a constitutional right to payments from the state so that they may obey commands of religious conscience. *Cf., Brusca v.*

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State of Missouri ex rel. State Board of Education, 332 F. Supp. 275, *aff'd.,* memorandum decision, — U. S. —, 92 S. Ct. 1493 (1972); *Committee for Public Education v. Cherry, supra.* Rather, they assert, with the Supreme Court in *Everson,* that the state

> ". . . cannot *exclude* individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith or lack of it,* from receiving the benefits of public welfare legislation." *Everson, supra,* at 16. (Emphasis supplied to word, "exclude".)

The District Court, by its action has excluded, as a group, the individual parent appellants, Diaz, Zimmerspitz, Kretzmann, Harvey and Powell, from the benefits of Act 92, on the ground that the statute would encourage them to perform an act of conscience and will, which, by any definition, would be "because of their faith"—namely, pay a tuition to a school chosen for their child out of religious interest and desire.

But as race and alienage may not be employed as standards for discrimination, neither may religion. *Oyler v. Boles,* 368 U. S. 448, 456 (1968). *To hold that an individual must be cut off from welfare benefits aimed at a class to which he plainly belongs, on the ground that these benefits may, to some extent, serve to accommodate his preference for a religious education for his child, is as much an offense to the principles of Equal Protection and of government neutrality towards religion as it is a gross caricature of the principle of Nonestablishment.*

CONCLUSION.

In view of the foregoing, it is submitted that the District Court was in error in concluding that Act 92 is unconstitutional, and that its judgment should be reversed.

Respectfully submitted,

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